Leung Kai Fook Medical Co Pte Ltd & Anor v Jasmin bt Mohamad Ekbal (t/a sole proprietor under the name and style of Vairam Fancy Trading)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22IP-14–03 OF 2023
AZLAN SULAIMAN JC
24 OCTOBER 2023

Civil Procedure — Judgment and orders — Default judgment — Setting aside of — Default judgment entered against defendant — Defendant applied for stay of proceedings, extension of time, setting aside default judgment and leave to file defence — Whether application ought to be allowed

The plaintiffs manufactured and sold medicated oil under the 'Arm & Axe' brand, locally known as 'Minyak Cap Kapak', and had been doing so for decades. They had further registered the trademarks in Malaysia ('the trademarks'). The defendant was the sole proprietor of a shop in the downtown Masjid India area in Kuala Lumpur called Vairam Fancy Trading that she set up in February 2017. On 1 August 2022, the Enforcement Division of the Ministry of Domestic Trade and Consumer Affairs Malaysia conducted a raid on the business premises of Vairam Fancy Trading and seized 276 goods bearing the trademarks. The plaintiffs alleged they were counterfeit goods. The plaintiffs then issued two letters to the defendant notifying her of the counterfeit goods and the infringement of the patents, demanding an undertaking from her to cease from infringing the trademarks and compensation of RM50,000. When the defendant failed to respond to both letters, the plaintiffs filed this action for damages for trademark infringement and passing off. When the defendant failed to enter an appearance to the action after being served with the writ, they entered the default judgment against her on 12 April 2023. The plaintiffs then served the judgment and its notice of their intention to seek damages from her. The defendant was goaded into action only after that. The post judgment assessment of damages proceedings was fixed for hearing on 18 July 2023, and the defendant belatedly filed a memorandum of appearance on 13 July 2023 and filed an application ('the defendant's application') on 15 August 2023 seeking, inter alia: (a) a stay of the proceedings pending the disposal of the defendant's application; (b) for an extension of time to file the defendant's application; (c) to set aside the default judgment; and (d) for leave to file her defence.

Held, dismissing the application:

(1) Before proceedings in an action were stayed, special circumstances must be shown. As the defendant's affidavits did not depose to any, then this relief must be refused (see para 11).

(2) A cogent and reasonable explanation for delay must be provided before courts would exercise their discretion to grant the relief or order asked for. However, the defendant's explanation was neither cogent nor reasonable. There was no explanation whatsoever for the delay of over 30 days between the date she entered an appearance and the date she filed the defendant's application. Thus, her application for an extension of time failed (see paras 13–14 & 16).

(3) The defendant's allegations were made in afterthought. She very much did nothing after receiving the demand letters. Further, the plaintiff was under no duty in law to alert or give notice to the public that there were counterfeit products in the marketplace and of the differences between authentic and counterfeit products. The defendant had not made out any case for the court to exercise its powers and discretion to grant her leave to enter her defence (see paras 19–21).

[Bahasa Malaysia summary

Plaintif mengeluarkan dan menjual minyak ubat di bawah jenama 'Arm & Axe', yang dikenali sebagai 'Minyak Cap Kapak', dan telah melakukannya selama beberapa dekad. Mereka juga telah mendaftarkan cap dagangan di Malaysia ('cap dagangan'). Defendan merupakan pemilik tunggal sebuah kedai di kawasan pusat bandar Masjid India di Kuala Lumpur bernama Vairam Fancy Trading yang ditubuhkannya pada Februari 2017. Pada 1 Ogos 2022, Bahagian Penguatkuasaan Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia telah melakukan serbuan di premis perniagaan Vairam Fancy Trading dan merampas 276 barangan yang mengandungi cap dagangan. Plaintif mendakwa mereka adalah barangan tiruan. Plaintif kemudiannya mengeluarkan dua surat kepada defendan yang memberitahunya tentang barangan tiruan dan pelanggaran paten, menuntut aku janji daripadanya untuk berhenti daripada melanggar cap dagangan dan pampasan sebanyak RM50,000. Apabila defendan gagal menjawab kedua-dua surat, plaintif memfailkan tindakan ini untuk ganti rugi bagi pelanggaran cap dagangan dan kelirupaan. Apabila defendan gagal memasukkan kehadiran untuk tindakan itu selepas diserahkan dengan writ, mereka memasukkan penghakiman ingkar terhadapnya pada 12 April 2023. Plaintif kemudian menyampaikan penghakiman dan notisnya tentang niat mereka untuk mendapatkan ganti rugi daripadanya. Defendan telah didorong untuk bertindak hanya selepas itu. Prosiding penilaian ganti rugi pasca penghakiman telah ditetapkan untuk pendengaran pada 18 Julai 2023, dan defendan dengan lewat memfailkan memorandum kehadiran pada 13 Julai 2023 dan memfailkan permohonan ('permohonan defendan') pada 15 Ogos 2023 memohon, antara lain: (a) penangguhan prosiding sementara pelupusan

permohonan defendan; (b) untuk lanjutan masa untuk memfailkan permohonan defendan; (c) untuk mengetepikan penghakiman ingkar; dan (d) untuk kebenaran memfailkan pembelaannya.

Diputuskan, menolak permohonan:

(1) Sebelum prosiding dalam sesuatu tindakan ditangguhkan, keadaan khas harus ditunjukkan. Oleh kerana afidavit defendan tidak mendeposkan apa-apa, maka relif ini harus ditolak (lihat perenggan 11).

(2) Penjelasan yang kukuh dan munasabah untuk kelewatan mesti disediakan sebelum mahkamah akan menggunakan budi bicara mereka untuk memberikan relif atau perintah yang dipohon. Walau bagaimanapun, penjelasan defendan tidak meyakinkan dan tidak munasabah. Tiada sebarang penjelasan untuk kelewatan lebih 30 hari antara tarikh dia memasukkan kehadiran dan tarikh dia memfailkan permohonan defendan. Oleh itu, permohonannya untuk lanjutan masa adalah gagal (lihat perenggan 13–14 & 16).

(3) Dakwaan defendan dibuat dalam pemikiran kemudian. Dia tidak melakukan apa-apa selepas menerima surat tuntutan. Selanjutnya, plaintif tidak mempunyai kewajipan di sisi undang-undang untuk memaklumkan atau memberi notis kepada orang ramai bahawa terdapat produk tiruan di pasaran dan perbezaan antara produk tulen dan tiruan. Defendan tidak mengemukakan sebarang kes untuk mahkamah menggunakan kuasa dan budi bicaranya untuk memberikannya kebenaran membela diri (lihat perenggan 19–21).]

Cases referred to

Thye Ah Chai (t/a Kent Naga Enterprise) v Teraju Mercu Construction & Engineering Sdn Bhd [2014] 1 MLJ 422, CA (refd)

Legislation referred to

Rules of Court 2012 O 37 r 1, O 42 r 13

Tan Ming Chu (Lum Kok Kiong & Co) for the plaintiffs.
Abdul Rahman (Narai Alagu & Assoc) for the defendant.

Azlan Sulaiman JC:

INTRODUCTION

[1] Though the defendant's application is primarily to set aside the interlocutory default judgment entered against her on 12 April 2023 ('the default judgment'), as she had only filed it almost four months after she was served with the judgment, in the defendant's application, she first applies for

A the following relief/orders (in the order in which they are asked for):

(a) a stay of the proceedings (including execution proceedings) pending the disposal of the defendant's application;

(b) for an extension of time to file the defendant's application;

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(c) to set aside the default judgment;

(d) for leave to file her defence; and

(e) for costs to be in the cause.

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SALIENT BACKGROUND FACTS

[2] The plaintiffs manufacture and sell the medicated oil under the 'Arm & Axe' brand, locally known as 'Minyak Cap Kapak', and have been doing so for decades. They have further registered the following trademarks in Malaysia (collectively, 'the trademarks'):

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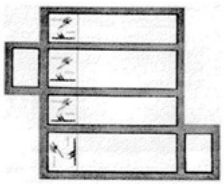
Trademarks	Class	Registration No
	5	M/004859
	5	S/008002
Logo Arm & Axe dengan tulisan AXE Brand	5	89001581

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Trademarks	Class	Registration No
Arm & Axe dengan Cap Kapak	5	89001582

[3] Because of the popularity and success of the plaintiff's products, they have been earning millions annually each year. The downside of that success is that they are subject to the scourge of counterfeit products, and therefore often find themselves in what seems an endless battle to eradicate them.

[4] Enter the defendant. The defendant is the sole proprietor of a shop in the downtown Masjid India area in Kuala Lumpur called Vairam Fancy Trading that she set up in February 2017. Officially, the nature of that business is 'Pemborongan barang-barang runcit, pemborongan kemas tiruan, kon inai, kedai serbaneka'.

[5] On 1 August 2022, the Enforcement Division of the Ministry of Domestic Trade and Consumer Affairs, Malaysia, conducted a raid on the business premises of Vairam Fancy Trading and seized 276 goods bearing the trademarks. The plaintiffs allege they are counterfeit goods.

[6] The plaintiffs, through their solicitors, then issued two letters to the defendant on 30 August 2022 and 17 October 2022 notifying her of the counterfeit goods and the infringement of the patents, demanding an undertaking from her to cease from infringing the trademarks and compensation of RM50,000.

[7] When the defendant failed to respond to both letters, the plaintiffs filed this action for damages for trademark infringement and passing off on 20 March 2023. When the defendant failed to enter an appearance to the action after being served with the writ, they entered the default judgment against her, on 12 April 2023.

[8] The plaintiffs then served the judgment and its notice under O 37 r 1 of the Rules of Court 2012 of their intention to seek damages from her on 27 April 2023.

[9] The defendant was goaded into action only after that. The

A post-judgment assessment of damages proceedings was fixed for hearing on 18 July 2023, and he solicitors belatedly filed a memorandum of appearance on 13 July 2023 and filed the defendant's application on 15 August 2023.

[10] I will now deal with each relief she seeks in turn.

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FOR A STAY OF THE PROCEEDINGS

[11] It is trite law that, before proceedings in an action are stayed, special circumstances must be shown. As her affidavits do not depose to any, then this relief must be refused. In any event, no stay of proceedings is necessary as I have herein disposed of the defendant's application.

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FOR AN EXTENSION OF TIME

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[12] Order 42 r 13 of the Rules of Court 2012 sets a 30-day period to set aside a default judgment, which runs from the date the judgment was received. Here, the defendant received the default judgment on 27 April 2023, and only filed the defendant's application on 15 August 2023.

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[13] It is trite law that a cogent and reasonable explanation for delay must be provided before courts will exercise their discretion to grant the relief or order asked for. In her first affidavit in support of the defendant's application, she proffered an explanation, which can be summarised as follows:

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(a) she is not highly educated and has no legal background;

(b) she has no knowledge of court procedures and therefore did not understand the consequences of the service of the writ;

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(c) she does not know about entering an appearance through the court's EFS system and attending e-reviews;

(d) she panicked and needed time to study the writ;

(e) she asked her friends and family members, and they advised her to appoint a lawyer; and

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(f) by the time she appointed and consulted a lawyer, she discovered the default judgment that had already been entered against her and the assessment of damages proceedings.

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[14] I find that her explanation is neither cogent nor reasonable. In fact, I do not believe her. For several reasons:

(a) the memorandum to be subscribed on the writ in Form No 2 of Appendix A to the Rules is simple and easy to understand:

(i) it informs the defendant that he/she/it must enter an appearance to the writ and the time limit to do;

(ii) it informs the defendant that he/she/it that the plaintiff can 'meneruskan untuk mendapatkan penghakiman dan perlaksanaan' if no appearance is entered;

(iii) it informs the defendant of options for entering an appearance; and

(iv) it is purposely made simple and easy to understand because it is recognised that often enough to defendants are individuals who may wish to defend in person.

(b) the defendant is not illiterate and does not even claim to be. She is a business owner, set up her business in 2017, and is still operating it six years on. Someone of that stature would be able to understand that memorandum;

(c) if it was true that she panicked, she would responded immediately. She could also have asked her friends and family for advice pronto. It would also not have been difficult for her to locate lawyers in the same area she operated her business, and her friends and family could certainly have pointed her in the direction of one; and

(d) there was no explanation whatsoever for the delay of over 30 days between the date she entered an appearance (13 July 2023) and the date she filed the defendant's application (15 August 2023).

[15] In *Thye Ah Chai (t/a Kent Naga Enterprise) v Teraju Mercu Construction & Engineering Sdn Bhd* [2014] 1 MLJ 422, Anantham Kasinather JCA said:

> There is a plethora of authorities to the effect that O 42 r 13 is mandatory and that an applicant filing an application beyond the prescribed time limit is obliged to provide cogent reasons for any delay. We need cite only one authority in support of this proposition. This court in the case of *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 opined through the judgment of Gopal Sri Ram JCA (as he then was) in a case also involving an application to set aside a default judgment that:
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> > It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus*, *non dormientibus*, *jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant. In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.
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> A careful examination of the judgment of the learned trial judge suggests that His

Lordship after satisfying himself that the default judgment was regularly obtained, thereafter proceeded to consider whether there were merits in the proposed defence of the respondent. Upon being satisfied that the proposed defence had merits, His Lordship then proceeded to set aside the default judgment obtained by the appellant. With respect, there appears to have been no consideration of the reasons for the delay advanced by the applicant for filing the application out of time nor any reasons included in the judgment of the court as to why His Lordship chose to exercise his discretion by hearing the application for leave to set aside the judgment without evaluating the evidence proffered by the applicant for the delay behind the filing of the application. Indeed, as explained earlier, His Lordship appears to have not made any ruling on the application for leave to file out of time.

On the hearing of this appeal, we allowed this appeal because as explained earlier, His Lordship did not have any regard to the pronouncements of this court in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* when exercising the discretion to entertain the application for leave to set aside the default judgment notwithstanding that the application was filed some five months after the time permitted by O 42 r 13. In our judgment, the reasons provided by the respondent for the delay are so frivolous, that they ought to have been rejected by the court. The learned trial judge's failure to address this issue, in our judgment, warrants appellate intervention.

[16] Thus, her application for an extension of time fails. With no extension of time granted, the defendant's application also fails.

LEAVE TO FILE A DEFENCE

[17] For completeness, I will nevertheless deal with this issue.

[18] The defendant's contentions that she has a defence to the plaintiffs' claims can be gleaned from her affidavit and the proposed defence she annexed to it. Her defences can summarised as follows:

(a) she purchased the counterfeit products on several occasions between from a business called 'MJ Mesra' in 2020 and 2021;

(b) she did not know the products she bought were counterfeit;

(c) she had compared the products she bought with the same products sold at a nearby shop and they looked the same;

(d) she disputed the plaintiffs' allegations that the products she sold were counterfeit; and

(e) the plaintiff were under a duty to but failed did not give adequate notice to the public that there were counterfeit products in the marketplace and of the differences between authentic and counterfeit products.

[19] In my view, these allegations are made in afterthought:

(a) the raid in August 2022 of her premises and the seizure of that specific product must certainly have caused any reasonable person to suspect that the goods were seized for a reason and were counterfeit. The seizure also resulted in a sizeable loss to her, not only from the sums she had paid to the supplier for them but also the profit she expected to make. Yet she did nothing;

(b) she very much did nothing again after receiving those demand letters; and

(c) thus, the writ would not have been something that came out of the blue. Again, she did nothing, or at least nothing that anyone claiming to be in a panicked state would do.

[20] Further, the plaintiff is under no duty in law to alert or give notice to the public that there were counterfeit products in the marketplace and of the differences between authentic and counterfeit products. The maxim *caveat emptor* requires purchasers to be vigilant.

[21] Consequently, in my view, the defendant had not made out any case for this court to exercise its powers and discretion to grant her leave to enter her defence.

Application dismissed.

Reported by Nabilah Syahida Abdullah Salleh